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NO.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1988

PAUL J. AZAR, JR., M.D., Petitioner,

vs.

STATE OF LOUISIANA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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QUESTION PRESENTED FOR REVIEW

1. Does the Louisiana computer fraud statute, which proscribes as a felony fraudulent thought with any tangential use of a computer, violate the Due Process Clause of the Fourteenth Amendment because of impermissible vagueness?

LIST OF PARTIES

The State of Louisiana is represented by the office of the Attorney General of the State of Louisiana, William J. Guste, Jr. The office of the District Attorney for the Fifteenth Judicial District, State of Louisiana, also has involvement in representing the State of Louisiana.

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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1988

PAUL J. AZAR, JR., M.D., Petitioner,

vs.

STATE OF LOUISIANA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

The petitioner, Paul J. Azar, Jr., M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Louisiana, which was entered on March 13, 1989 with rehearing denied on April 20, 1989.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court is reported in No. 88-WA-2459 (La. Mar. 13, 1989). The denial by the Louisiana Supreme Court of the application for rehearing is reported in No. 88-WA-2459 (La. Apr. 20, 1989). The opinion of the Louisiana Third Circuit Court of Appeal is reported at 535 So.2d 441 (La. App. 3rd Cir. 1988). The opinion of the district court was not reported.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on March 13, 1989, and rehearing was timely sought. The Louisiana Supreme Court denied the application for rehearing on April 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) to review the final judgment or decree of the highest court of the State of Louisiana on the ground that a Louisiana criminal statute is invalid because repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. Section 1 of the 14th Amendment, United States Constitution, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Louisiana Computer Crime Statutes, La. R.S. 14:73.1 *et. seq.*, including La. R.S. 14:73.5, which is entitled "Computer Fraud" and which provided at all pertinent times:

> "A. Computer fraud is the accessing or causing to be accessed of any computer, computer system, computer network, or any part thereof with the intent to:
>
> (1) Defraud; or

(2) Obtain money, property, or services by means of false or fraudulent conduct, practices, or representations, or through the alteration, deletion, or insertion of programs or data.

B. Whoever commits computer fraud shall be fined not more than ten thousand dollars, or imprisoned with or without hard labor for not more than five years, or both."

STATEMENT OF THE CASE

The Indictment

Dr. Paul J. Azar, Jr. ("Dr. Azar") stands accused of computer fraud. On July 27, 1987, a Lafayette Parish, Louisiana grand jury indicted Dr. Azar on 37 counts of computer fraud in violation of La. R.S. 14:73.5. Dr. Azar is an eye surgeon practicing in Lafayette, Louisiana. The charges in some way concern the alleged billing for assistant eye surgeon services.[1] The 37 counts are identical in language except for each count reciting a different date. All 37 counts charge Dr. Azar with having

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[1]The factual allegations against Dr. Azar are hardly clear. However, the Louisiana Third Circuit Court of Appeal in its opinion succinctly offered this factual backdrop:

> "In 1985, Congress passed the Consolidated Omnibus Budget Reconciliation Act of 1985 ('COBRA'), which added certain new subsections to the Medicare provisions. The new statute prevents cataract surgery patients who are enrolled in the Medicare program from engaging the services of an assistant eye surgeon to work with the primary surgeon. The statute has the effect of severely restricting the payment of assistant surgeon fees by Medicare.
>
> Relator, a Lafayette eye surgeon, has been charged with computer fraud with respect to his computerized billing of assistant eye surgeon fees." *State v. Azar*, 535 So.2d 441, 442 (La. App. 3rd Cir. 1988).

"committed the offense of Computer Fraud as defined by Louisiana Revised Statute Title 14, Article 73.5, in that he did access or cause to be accessed, a computer, computer system or computer network, or any part thereof, with the intent to defraud or obtain money by means of false or fraudulent conduct, practices, or representations or through the insertion of programs or data."

The Louisiana Computer Crime Legislation

La. R.S. 14:73.5 is one of five statutes enacted in 1984 and constituting a subpart of the Louisiana Criminal Code entitled "Computer Related Crime". La. R.S. 14:73.1 provides definitions for words and terms found in these computer crime statutes. La. R.S. 14:73.2 is entitled "offenses against intellectual property" and prohibits the intentional destruction or copying of computer programs or computer stored information; La. R.S. 14:73.3 is entitled "offenses against computer equipment or supplies" and prohibits the intentional modification or destruction of computer equipment or computer supplies; and La. R.S. 14:73.4 is entitled "offenses against computer users" and prohibits the intentional denial to an authorized user of full use of a computer.

La. R.S. 14:73.5 is entitled "computer fraud". When enacted and when the indicted offenses allegedly occurred, La. R.S. 14:73.5 read as follows: [2]

---

[2] La. 14:73.5(A)(2) was amended in 1988 and now reads:

> "(2) Obtain money, property, or services by means of false or fraudulent conduct, practices, or representations, or through the <u>fraudulent</u> alteration, deletion, or insertion of programs or data."

The amendment added the emphasized word to the statute.

"A. Computer fraud is the accessing or causing to be accessed of any computer, computer system, computer network, or any part thereof with the intent to:

(1) Defraud; or

(2) Obtain money, property, or services by means of false or fraudulent conduct, practices, or representations, or through the alteration, deletion, or insertion of programs or data.

B. Whoever commits computer fraud shall be fined not more than ten thousand dollars, or imprisoned with or without hard labor for not more than five years, or both."

Also, La. R.S. 14:73.1 offers the following definitions for the words "access" and "computer":

"(1) 'Access' means to program, to execute programs on, to communicate with, store data in, retrieve data from, or otherwise make use of any resources, including data or programs, of a computer, computer system, or computer network.

(2) 'Computer' includes an electronic, magnetic, optical, or other high-speed data processing device or system performing logical, arithmetic, and storage functions, and includes any property, data storage facility, or communications facility directly related to or operating in conjunction with such device or system. 'Computer' shall not include an automated typewriter or typesetter, a machine designed solely for word processing, or a portable hand-held calculator, nor shall 'computer' include any other device which might

contain components similar to those in computers but in which the components have the sole function of controlling the device for the single purpose for which the device is intended." (Emphasis added.)

The Proceedings In The Louisiana Courts

(a) Motion To Quash And Hearing In Trial Court

On November 16, 1987, Dr. Azar filed a motion to quash the indictment on the grounds that the Louisiana computer fraud statute was unconstitutionally vague and overbroad.

On January 22, 1988, a hearing on that motion to quash was conducted. At that hearing, Dr. Azar presented three witnesses. The first witness was Allen Bradley, a member of the Louisiana House of Representatives. Representative Bradley was the author in 1984 of a bill addressing computer crime that after substantial amendment resulted in the Louisiana computer crime legislation. Representative Bradley testified that in passing the computer crime provisions the legislature sought to address criminal conduct caused by new computer technology that was not encompassed by then existing criminal statutes. (Hearing at 17) Specifically, legislative concern was threefold: (1) the stealing of money by using a computer to simply transfer money from one account to another; (2) the unauthorized copying and selling of information stored in a computer; and (3) the unauthorized destroying or altering of information stored in a computer. Concerning legislative intent on fashioning a sweeping criminal statute triggered by any computer usage, Representative Bradley testified:

"The intent of the legislature was to address those problems where offenses were committed by the use of a computer, where your traditional statutes didn't cover it. In other words, just because the information went through a computer at some point didn't mean that it was

necessarily a computer offense. You can still have the theft. And if the theft statute addressed it, it was the intention of the legislature to draft a statute which would go -- would address a theft by the use of a computer, where the traditional theft statute would not address it." (Hearing at 27-28)

Representative Bradley added: "[I]f you're talking about intent, the intent was to provide a statute which would address an area that was not covered by previous statutes." (Hearing at 27-28)

The second witness was Dr. James Oliver, a university professor of computer science since 1959 and a computer consultant. The court qualified Dr. Oliver as an expert in computers. Dr. Oliver testified on the definitions of "access" and "computer" provided by La. R.S. 14:73.1 and the ambit of La. R.S. 14:73.5. Concerning the definition of "access", Dr. Oliver deemed it "extremely broad" and noted that with storing data in a computer, "there are many ways in which that can and does occur, and many of these ways we really don't -- aren't aware of in our everyday operations." (Hearing at 44) As examples, the storing of data in a computer occurs when one operates an automated bank teller machine, calls an automated time and temperature telephone program, or drives on a city street with computer-controlled traffic lights.

Concerning the definition of "computer", Dr. Oliver was not critical of the first sentence in 14:73.1(2) except that it excluded "dumb terminals", which do not perform "logical, arithmetic, and storage functions," but do "correspond with the computer." (Hearing at 47) Dr. Oliver was critical of the exclusions in the definition of "computer," testifying that many automated typewriters or typesetters are tied directly to computers, that the definition's final provision pertaining to other devices with "components similar to those in computers" was difficult to comprehend, and that contradictions existed in this statutory definition. (Hearing at 47-48)

The third witness was Dr. Mary Dichmann, a university professor of English. The court qualified Dr. Dichmann as an expert in grammar and linguistics. Her testimony principally concerned 14:73.5(A)(2). In essence, Dr. Dichmann stated that given the wording of the (A)(2) subsection, the words "false or fraudulent" modified only the phrase "conduct, practices, or representations," and did not modify the phrase "through the alteration, deletion, or insertion of programs or data." (Hearing at 71-72)

On February 8, 1988, the trial court by minute entry denied Dr. Azar's motion to quash. However, on February 15, 1988, the trial court ordered a stay of proceedings to allow Dr. Azar opportunity to apply for a writ of certiorari with the Louisiana Third Circuit Court of Appeal.

(b) Opinion of the Louisiana Court of Appeal

On September 12, 1988, after granting a writ of certiorari, the Louisiana Third Circuit Court of Appeal found La. R.S. 14:73.5 unconstitutionally vague and reversed the trial court's denial of the motion to quash. Concluding the definition of "access" to be unduly vague, the court of appeal stated:

> "In this day and time when computer technology is such a part of our everyday lives, an ordinary man of reasonable intelligence may access or cause a computer to be accessed without the slightest awareness that this access has taken place. The statute is clearly intended to proscribe that conduct wherein the use of a computer is central and an essential element of the crime, i.e., the crime could not have been committed 'but for' the use of a computer. Applying the definition of 'access' as it now exists, unlawful conduct may involve only incidental access or use of a computer and remain within the broad parameters of the conduct proscribed by La.

R.S. 14:73.5. 'A vague statute describes conduct in a manner so unclear that it leaves intelligent people uncertain as to the limits of its application.' We find the definition of 'access' set forth in La. R.S. 14:73.1(1), unconstitutionally vague insofar as an accused could be subject to prosecution without any awareness that an 'access' to a computer had taken place." *State v. Azar*, 535 So.2d at 445 (citation omitted).

(c) Opinion of the Louisiana Supreme Court

On March 13, 1989, on appeal, the Louisiana Supreme Court ruled that the computer fraud statute was constitutional except for the phrase "or through the alteration, deletion, or insertion of programs or data" in 14:73.5(A)(2); that the impermissibly vague phrase could be severed from the remainder of the statute; and that the trial court's denial of the motion to quash should be reinstated in accordance with its opinion.

On or about March 27, 1989, Dr. Azar timely applied for rehearing with the Louisiana Supreme Court. On April 20, 1989, the Louisiana Supreme Court denied his application for rehearing.

Dr. Azar seeks a writ of certiorari to review the judgment of the Louisiana Supreme Court.

ARGUMENT

I. The Louisiana Computer Fraud Statute Is A Criminal Law Of Undue Vagueness And Chilling Sweep That Violates The Due Process Clause Of The Fourteenth Amendment.

This Court frequently admonishes that

> "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299 (1972) (emphasis added).

The Louisiana computer fraud statute is unconstitutionally vague. First, because of the wording of the statute and the definitions of "access" and "computer", a person of ordinary intelligence upon reading the law is not given fair notice of what it prohibits. Second, because of the statute's breadth, the law gives unlimited discretion to law enforcement officials in deciding who to arrest and prosecute.

In this case, Dr. Azar is charged with 37 counts of computer fraud, proscribed by La. R.S. 14:73.5. In pertinent part, La. R.S. 14:73.5 reads:

> A. "Computer fraud is the accessing or causing to be accessed of any computer, computer system, computer network, or any part thereof with the intent to:
>
> (1) Defraud; or

(2) Obtain money, property, or services by means of false or fraudulent conduct, practices, or representations. . . ."

In structure, the Louisiana computer fraud statute consists of three elements: (1) the accessing or causing to be accessed; (2) of a computer, computer system or computer network; (3) with the intent to defraud or to obtain property "by means of false or fraudulent" conduct or representations. Under the statute, one having a larcenous thought and tangentially causing a computer to be used commits computer fraud.

The breadth of the definitions of La. R.S. 14:73.1 and of the wording of La. R.S. 14:73.5 is awesome. The statutory definition of "access" is

> "to program, to execute programs on, to communicate with, store data in, retrieve data from, or <u>otherwise make use of any resources, including data</u> or programs, <u>of a computer,</u> computer system, or computer network." La. R.S. 14:73.1(1) (emphasis added).

At best, use of the word "access" is awkward. Among those working with computers, "access" means the act of entering information for gaining electronic entry into a particular computer program. However, as defined by La. R.S. 14:73.1, "access" means simply using a computer or "mak[ing] use of any resources, including data. . . of a computer." Under this definition, a person using information produced by a computer "accesses" a computer, even if he does not physically touch it. Dr. Oliver testified that this definition of "access" is "extremely broad" and that there exist numerous instances when people unknowingly "communicate with" or "store data in" a computer. (Hearing at 44)

The statutory definition of "computer" is equally broad. La. R.S. 14:75.1(2) defines "computer" as

> "an electronic, magnetic, optical or other high-speed data processing device or system performing logical, arithmetic, and storage functions, and includes any property, data storage facility, or communications facility directly related to or operating in conjunction with such device or system. 'Computer' shall not include an automated typewriter or typesetter, a machine designed solely for word processing, or a portable hand-held calcultor, nor shall 'computer' include any other device which might contain components similar to those in computers but in which the components have the sole function of controlling the device for the single purpose for which the device is intended."

Concerning this definition, Dr. Oliver testified that "dumb terminals" would not constitute a "computer" because these terminals merely "correspond with the computer" and do not perform logical, arithmetic or storage functions; that automated typewriters and typesetters "directly [tied] to" computers should not be excluded as "computers"; and that he would "have to leave it up for the grammarians and linguists" to discuss the last definition exclusion pertaining to other devices "contain[ing] components similar to those in computers." (Hearing at 47-48)

Given the definitions set out in La. R.S. 14:75.1, Dr. Oliver gave the following examples of how a "computer" can be "accessed":

> "In ways which I have mentioned in the report and of which I'll repeat for the Court, such simple operations as we engage in every day, many of the ATMs or automatic teller machines are, indeed, controlled by a general purpose computer. Many of the time and temperature programs that we access are controlled by a general

purpose computer. A large part of the traffic system in the City of Lafayette is controlled by a general purpose computer. And when you and I drive our automobiles over the little thin metal strips which you may see embedded in the pavement, the presence of our automobile creates a perturbation, as it's called, in the signal being received by that metal strip , and that is information. And so that, -- and as I defined earlier in response to Mr. Petersen's question, the information that one puts into a computer can be data, can be programs, or it can be perimeters. And this, in fact, causes the traffic system to be adjusted -- to be altered by virtue of the fact that we drive over that particular detector." (Hearing at 44-45)

The proliferation of computers and of computer activity in the past generation has been staggering. The number of large general purpose computers, smaller business computers, minicomputers, desktop computers and computer terminals is great. "Computer technology has become an indispensable part of nearly every product, every job, every trivial pursuit. And it's becoming portable as well." *The Portable Executive*, BUSINESSWEEK, Oct. 10, 1988, at 102. Indeed, it is difficult to conceive of any activities in contemporary America affecting agriculture, finance, education, the sciences, the professions or sports that eventually do not cause a computer, broadly defined, to be used.

The legislative intent with R.S. 14:73.5 was limited. As Representative Bradley testified at the motion to quash hearing,

> "[t]he intent of the legislature was to address those problems where offenses were committed by the use of a computer, where your traditional statutes didn't cover it. In other words, just because the information went through a computer at some point didn't mean that it was necessarily a computer offense." (Hearing at 27-28)

And as the Louisiana Third Circuit Court of Appeal concluded in finding the statute unconstitutionally vague,

> "[t]he statute is clearly intended to proscribe that conduct wherein the use of a computer is central and an essential element of the crime, i.e. the crime could not have been committed 'but for' the use of a computer. Applying the definition of 'access' as it now exists, unlawful conduct may involve only incidental access or use of a computer and remain within the broad parameters of the conduct proscribed by La. R.S. 14:73.5." *State v. Azar*, 535 So.2d at 445 (emphasis added).

In wording, however, the Louisiana computer fraud statute does not simply proscribe anti-social conduct long prohibited by other laws or made possible only by the advent of computer technology: It proscribes the forming of a fraudulent intent coupled with any incidental computer usage -- regardless of the absence of conspiracy, of the performance of any acts toward accomplishing the object of the intent, or of the likelihood of the object being fulfilled. A person who momentarily intends to commit a misdemeanor shoplifting offense while for some preparatory purpose driving a car on streets with a computer-controlled traffic system commits the felony of computer fraud. Unlike Louisiana, other states substantially narrow the ambit of their computer fraud statutes by prohibiting only access that is "knowing", "willful" or "without authorization". See, e.g., Ariz. Rev. Stat. § 13-2316 ("accessing. . .without authorization"); Cal. Penal Code § 502 (c)(l) ("[k]nowingly accesses and without permission"); Colo. Rev. Stat. § 18-5.5-102(1) ("knowingly uses"); Ga. Code § 16-9-93 ("knowingly and willfully, directly or indirectly, without authorization, accesses"); Ky. Rev. Stat. § 434.845 ("knowingly and willfully"); Nev. Rev. Stat. § 205.4765(1) ("knowingly, willingly and without authorization"); N.D. Cent. Code § 12.1-06.1-08 ("without authorization"); Tenn. Code § 39-3-1404(a)

("knowingly and willfully"). "Willfully" means a person committing an act "voluntarily and with the purpose of violating the law"; it "means having the specific intent to do something the law forbids." *United States v. Wells*, 766 F.2d 12, 20 (lst Cir. 1985). "Knowingly" means a person realizing what he is doing and aware of the nature of his conduct; "[i]t means that he did not act through ignorance, mistake or accident." *United States v. Lawson*, 780 F.2d 535, 542 (6th Cir. 1985). Under these laws, one would not commit computer fraud by driving a car on computer-controlled streets or calling an automated time and temperature telephone program because there would be no knowing, willful or unauthorized access of a computer.

On the other hand, the Louisiana statute (1) defines in sweeping fashion "computer" to encompass devices that most would not imagine are "computers" and (2) then proscribes any use of the computer or its resources with the existence of fraudulent intent -- even if the use be authorized, unknowing and incidental. Because the Louisiana statute so broadly defines accessing of a computer, one can perform countless everyday and innocent acts that access a computer without any awareness of computer involvement. In effect, this statute prohibits forming a fraudulent intent. Although not socially laudable, larcenous thought without more should not be criminal. Granted, there exist inchoate crimes like conspiracy and attempt. But absent conspiracy, the notion that planning a crime constitutes the commission of the crime itself

> "run[s] counter to a fundamental concept that underlies our criminal justice system. Until an individual actually commits an offense, he is innocent. Thinking about perpetrating a crime is not unlawful. The evil lies in the commission of the illegal act. Prior to the time one actually crosses the line and acts, there is always the possibility that conscience, civic responsibility or plain good judgment will prevail." *United States v.*

Washington Water Power Co., 793 F.2d 1079, 1082 (9th Cir. 1986).

Although many states[3] and the federal government[4] have criminal statutes proscribing computer-related conduct, there exist few reported decisions discussing these computer crime laws. We believe only one other court has addressed the constitutionality of a computer crime statute. In *State v. Joyner*, 759 S.W.2d 422, 425 (Tenn.Cr.App. 1987), a Tennessee appellate court with little discussion dismissed a "belated contention" that the Tennessee computer fraud statute was unconstitutionally vague and overbroad. In that case, the court did not consider the ambit of "computer" or "access", or the overall reach of the statute.

Computer crime legislation has engendered, if not jurisprudence, critical doctrinal writings. As one writer has noted concerning Wyoming's computer crime statutes,

"great caution must be exercised to make certain that the

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[3]Ala. Criminal Code §§ 13A-8-100 to 13A-8-103; Alaska Stat. § 11.46.740; Ariz. Rev. Stat. §§ 13-2301 and 13-2316; Ark. Stat. §§ 5-41-101 to 5-41-104; Cal. Penal Code § 502; Colo. Rev. Stat. §§ 18-5.5-101 to 18-5.5-102; Conn. Penal Code §§ 53a-250 to 53a-261; Del. Code Title 11, §§ 931 to 939; Fla. Stat. §§ 815.01 to 815.06; Ga. Code §§ 16-9-90 to 16-9-94; Haw. Rev. Stat. §§ 708-890 to 708-896; Idaho Code §§ 18-2201 to 18-2202; Ill. Ann. Stat. Ch. 38, §§ 16D-1 to 16D-6; Ind. Code § 35-43-1-4; Iowa Code §§ 716A.1 to 716A.14; Kan. Stat. § 21-3755; Ky. Rev. Stat. §§ 434.840 to 434.860; Mary. Code, art. 27, § 146; Mich. Stat. §§ 752.792 to 752.797; Minn. Stat. §§ 609.87 to 609.89; Miss. Code §§ 97-45-1 to 97-45-11; Mo. Rev. Stat. §§ 569.093 to 569.099; Mont. Code §§ 45-2-101, 45-6-310 and 45-6-311; Nev. Rev. Stat. §§ 205.473 to 205.477; N.H. Rev. Stat. §§ 638.16 to 638.19; N.M. Stat. §§ 30-16A-3 and 30-16A-4; N.Y. Penal Law §§ 156.00 to 156.50; N.D. Cent. Code § 12.1-06.1-08; Ohio Rev. Code § 2913.81; Okla. Stat. Title 21, §§ 1951-1955; Pa. Stat. Title 18, § 3933; R.I. Gen. Laws §§ 11-52-1 to 11-52-4; S.C. Code §§ 16-16-10 to 16-16-40; S.D. Codified Laws §§ 43-43B-1 to 43-43B-6; Tenn. Code §§ 39-3-1401 to 39-3-1406; Tex. Penal Code §§ 33.01 to 33.04; Utah Code §§ 76-6-701 to 76-6-703; Va. Code §§ 18.2-152.1 to 18.2-152.14; Wash. Rev. Code §§ 9A.52.110 to 9A.52.130; Wis. Stat. § 943.70; Wyo. Stat. §§ 6-3-501 to 6-3-504.

[4]18 U.S.C. § 1030.

> acts prohibited and the penalties imposed for those acts are appropriate. The mystery of the computer should not be a basis for making criminal certain acts where computers are concerned that would be innocuous where other instrumentalities or forms of property are involved.
>
> * * * * *
>
> [I]t is not at all certain that one who destroys home computer data relating to Aunt Martha's chocolate fudge recipe or a computer game with a value of twenty dollars should be punished as a felon." Lauer, *Goodbye 3 - Card Monte: The Wyoming Criminal Code of 1982*, 19 LAND & WATER L. REV. 509, 533 (1984) (emphasis added).

Another commentator has warned that unless computer crime laws are carefully drafted, these statutes will cover telephones, electronic watches and automated traffic signals. Gemignani, *Computer Crime: The Law in '80*, 13 IND. L. REV. 681, 708-709 (1980).

In summary, the Louisiana computer fraud statute is impermissibly vague for two reasons. First, the law fails to give persons of ordinary intelligence fair notice that their contemplated conduct is prohibited. The ambit of "access" and "computer" is vast. The definition of "computer" is a thicket, riddled with contradiction and an exception defying grammatical construction. The statute reaches not simply criminal conduct requiring computer use for commission, but also acts of tangential computer use previously lawful. In *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839 (1972), this Court struck because of vagueness a municipal vagrancy ordinance that prohibited traditionally lawful activities. In that case, this Court observed:

> "The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent. 'Nightwalking' is one. Florida construes the ordinance not to make criminal one night's wandering, only the 'habitual' wanderer or, as the ordinance describes it, 'common night walkers.' We know, however, from experience that sleepless people often walk at night, perhaps hopeful that sleep-inducing relaxation will result." *Id.* at 163-164, 844.

Like the vagrancy ordinance in *Papachristou*, the Louisiana computer fraud statute encompasses "normally innocent" activities and leaves a reader of the law bewildered as to what it prohibits and what it does not prohibit.

Second, because of its forbidding swath, the statute gives unfettered discretion to police and prosecutors in determining who to arrest and prosecute. In *Papachristou, id.* at 165, 845 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)), this Court observed of the broad criminal statute:

> "It would be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."(Emphasis added.)

The Louisiana computer fraud statute fashions a net as large and as fraught with law enforcement discretion as the one cast by the *Papachristou* ordinance.

II. The Ruling By The Louisiana Supreme Court Is A "Final Judgment" Under 28 U.S.C. § 1257(a) And Review By This Court Is Necessary To Prevent Injustice.

28 U.S.C. § 1257(a) provides for review by this Honorable Court of the

> "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . ." (Emphasis added.)

This case presents a new form of criminal statute because of both the computer technology it involves and the relative ease by which it can be violated. Yet this case also involves the venerable principle that impermissibly vague laws cannot stand. As to the constitutionality of the Louisiana computer fraud law, the Louisiana courts have spoken. In passing on the prosecution's appeal and in denying Dr. Azar's application for rehearing, the Louisiana Supreme Court has found the computer fraud statute not violative of due process. This Court is Dr. Azar's only remaining recourse on the constitutionality question.

Although 28 U.S.C. § 1257 speaks of "[f]inal judgments or decrees,"

> "[this] Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come. There are now at least four categories of such cases in which the court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of

> economic waste and of delayed justice,' as well as precipitate interference with state litigation." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-478, 95 S.Ct. 1029, 1037 (1975) (emphasis added) (citation omitted).

In *Cox Broadcasting, id.* at 479, 1038, the Court stated that one category of cases meeting the finality requisite of 28 U.S.C. § 1257 was

> "those cases in which there are further proceedings -- even entire trials -- yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained."

Another such category was

> "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation," *Id.* at 482-483, 1040 (emphasis added).

Cox Broadcasting involved an invasion of privacy suit against a television station under a Georgia statute providing a

cause of action for printing or broadcasting the name of a rape victim. The state trial court rejected the television station's claim that the state statute was violative of the First and Fourteenth Amendments and granted plaintiff summary judgment on liability with damages to be determined by the jury at trial. The Georgia Supreme Court upheld the constitutionality of the statute, but reversed plaintiff's summary judgment. Finding jurisdiction to review the Georgia Supreme Court judgment upholding the constitutionality of the state statute, this Court noted:

> "The Georgia Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the state courts. Appellants will be liable for damages if the elements of the state cause of action are proved. They may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, there should be no trial at all. Moreover, even if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments. Delaying final decision of the First Amendment claim until after trial will 'leave unanswered . . . an important question of freedom of the press under the Fifth Amendment,' 'an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press.' On the other hand, if we now hold that the First and Fourteenth Amendments bar civil liability for broadcasting the victim's name, this litigation ends." *Id.* at 485-486, 1041 (emphasis added) (citation omitted).

For several reasons, the Louisiana Supreme Court judgment in this case is "final" for purposes of 28 U.S.C. § 1257, and this

Honorable Court should issue a writ of certiorari.

First, the Louisiana Supreme Court's judgment that the computer fraud law does not contravene the Due Process Clause of the Fourteenth Amendment is clearly final. This determination will stand regardless of the subsequent disposition of the charges against Dr. Azar.

Second, it is believed this criminal prosecution is intertwined with the provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") and Medicare payment of fees of eye surgeons for services rendered as an assistant eye surgeon. This prosecution affects federal policies concerning COBRA and Medicare.

Third, other states have computer crime laws nearly identical to the Louisiana computer fraud law in statutory breadth and wording. Those laws that broadly proscribe computer accessing without requiring that the accessing be knowing, willful or unauthorized may be unconstitutionally vague, and the interests of justice argue for prompt resolution of their constitutionality.

Fourth, there is the substantial interest in shielding from further prosecution and the travail of a criminal trial a citizen, in this case a dedicated eye surgeon, under a constitutionally infirm criminal law. This interest is grounded on the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

Because of the statutory definitions of "access" and "computer" and because of the wording and sweeping ambit of Louisiana's computer fraud law, that statute is unconstitutionally vague. The statute clearly does not afford fair notice of what it prohibits. However, it gives law enforcement officials unlimited discretion in choosing whom they will arrest and prosecute.

If the computer fraud statute violates due process, then Dr. Azar should be spared further prosecution under that infirm law. Further, regardless of the outcome of any trial in this case, the Louisiana Supreme Court judgment affirming the constitutionality of the statute stands. The precedent of this decision will affect future prosecutions under the computer fraud statute of Louisiana and under computer crime statutes of other states.

Thus, we respectfully submit that a writ of certiorari should issue to review the judgment of the Louisiana Supreme Court.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF LOUISIANA

NO. 88-WA-2459

STATE OF LOUISIANA

V.

PAUL J. AZAR, JR., M.D.

WRIT TREATED AS AN APPEAL
FROM THE COURT OF APPEAL, THIRD CIRCUIT,
PARISH OF LAFAYETTE

MARCUS, Justice

Paul J. Azar, Jr. was indicted by the grand jury for thirty-seven counts of computer fraud in violation of La. R.S. 14:73.5. Defendant filed a motion to quash on the ground that La. R.S. 14:73.5 was unconstitutionally vague and overbroad. After a hearing, the trial judge denied the motion to quash.[1] Upon application by defendant, the court of appeal granted a writ of certiorari, declared La. R.S. 14:73.5 unconstitutionally vague, reversed the ruling of the trial judge and granted the motion to quash the indictment.[2] We granted the state's application and docketed the case as an appeal.[3]

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[1] At the hearing defendant presented three witnesses: Allen Bradley, Jr. (the legislator who handled the bill that became La. R.S. 14:73.5), Dr. James R. Oliver (an expert in computers) and Dr. Mary Dichmann (an expert in English grammar and linguistics).

[2] ___So. 2d _ (La. App. 3d Cir. 1988).

[3] ___So. 2d _ (La. 1988).

The sole issue presented for our consideration is whether La. R.S. 14:73.5 is unconstitutionally vague.[4]

La. R.S. 14:73.5 provides in pertinent part:

> A. Computer fraud is the accessing or causing to be accessed of any computer, computer system, computer network, or any part thereof with the intent to:
>
> (1) Defraud; or
>
> (2) Obtain money, property, or services by means of false or fraudulent conduct, practices, or representations, or through the alteration, deletion, or insertion of programs or data. [Emphasis added.]

The term "access" is defined in La. R.S. 14:73.1(1):

> (1) "Access" means to program, to execute programs on, to communicate with, store data in, retrieve data from, or otherwise make use of any resources, including data or programs, of a computer, computer system, or computer network.

The court of appeal found the last phrase in La. R.S. 14:73.5 (A)(2) and the definition of access in La. R.S. 14:73.1(1) to be unconstitutionally vague. Since the definition of access was

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[4] In his brief to this court, defendant also argues the statute is overbroad. The court of appeal found defendant's overbreadth argument had no merit. We agree. The United States Supreme Court has noted "outside the limited First Amendment context, a criminal statute may not be attacked as overbroad." Schall v. Martin, 467 U.S. 253 (1984). Even within the first amendment area, the Court has held that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601 (1973). Nonetheless, since defendant's overbreadth arguments are similar to his vagueness arguments, we will treat them in that context.

applicable throughout La. R.S. 14:73.5, the court reasoned that the entire statute could not withstand constitutional scrutiny and must fall.

The constitutional guarantee that an accused shall be informed of the nature and cause of the accusation against him requires that penal statutes describe unlawful conduct with sufficient particularity and clarity that ordinary persons of reasonable intelligence are capable of discerning its meaning and conforming their conduct thereto. U.S. Const. Amend. XIV, § 1; La. Const., Art. I, §§ 2, 13; Kolender v. Lawson, 461 U.S. 352 (1983); State v. Powell, 515 So. 2d 1085 (La. 1987); State v. Pierre, 500 So. 2d 382 (La. 1987). In determining the meaning of a statute and hence its constitutionality, penal statutes must be "given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision."La. R.S. 14:3; State v. Pierre, supra.

Applying these standards of statutory construction, the definition of access found in La. R.S. 14:73.1(1) offers a clear and definite standard of conduct. Dr. James R. Oliver, defendant's expert in computers, testified that he did not "necessarily have problems" with the definition, although he felt it was "extremely broad and people need to understand the implications in it quite clearly." However, Dr. Oliver never testified that an ordinary man of reasonable intelligence could not readily ascertain the definition of access from a reading of the statute. The definition chosen by the legislature, although perhaps broader than that used in the computer field, is not confusing or overly technical. The words of the statute when taken in their usual sense are readily understandable by an ordinary person of reasonable intelligence. Therefore, we find

the definition of access is not unconstitutionally vague.[5]

Defendant argues that although the definition of access in La. R.S. 14:73.1(1) may be clear on its face, the term is still vague when used in La. R.S. 14:73.5 since there is no requirement that the access be knowing. Defendant cites several hypothetical situations where a person might access a computer or cause it to be accessed without knowing it, such as telephoning a computerized time/temperature service. However, defendant's argument is misdirected. The crime in La. R.S. 14:73.5 is not merely accessing a computer or causing it to be accessed, but rather accessing a computer or causing it to be accessed with the intent to defraud.[6] Accessing a computer or causing it to be accessed is an element of the crime, but the mens rea required is the intent to defraud. The element of accessing a computer or causing it to be accessed is a fact that must be proven beyond a reasonable doubt by the state, but

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[5] Defendant also argues that the definition of computer provided in La. R.S. 14:73.1(2) is unconstitutionally vague. La. R.S. 14:73.1(2) provides:

> "Computer" includes an electronic, magnetic, optical, or other high-speed data processing device or system performing logical, arithmetic, and storage functions, and includes any property, data storage facility, or communications facility directly related to or operating in conjunction with such device or system. "Computer" shall not include an automated typewriter or typesetter, a machine designed solely for word processing, or a portable hand-held calculator, nor shall "computer" include any other device which might contain components similar to those in computers but in which the components have the sole function of controlling the device for the single purpose for which the device is intended.

Clearly, this definition taken in its usual sense is readily understandable by an ordinary person of reasonable intelligence. Hence, defendant's argument lacks merit.

[6] This situation should be distinguished from those instances where access itself is the crime. See, e.g., La. R.S. 14:72.2(A)(2):

> A. An offense against intellectual property is the intentional:
>
> (2) Disclosure, use, copying, taking, or accessing, without consent, of intellectual property. [Emphasis added.]

whether or not the defendant knows he accessed a computer or caused it to be accessed is irrelevant from a constitutional standpoint.[7] Knowledge of every element of a crime is not required as long as the statute provides a requisite mens rea.[8] Similarly, under federal law, a person's knowledge of the elements of the crime may be irrelevant if he has sufficient mens rea. In United States v. Feola, 420 U.S. 671 (1975), the United States Supreme Court addressed the issue in the context of a statute prohibiting assaults on federal officers. The defendants argued that they should not fall under the statute because they did not know the person assaulted was a federal officer. The Supreme Court disagreed: "Although the perpetrator ... may be surprised that his intended victim is a federal officer in civilian apparel, he nonetheless knows from the very outset that his planned course of conduct is wrongful." In the same way, a person who intends to defraud and who accesses a computer or causes it to be accessed can fall under La. R.S. 14:73.5 even if he has no knowledge of the access. As a result, we find no merit in defendant's argument that the term access as used in La. R.S. 14:73.5 is vague. The court of appeal erred in so holding.

Having found the definitions of access and computer constitutional, the next issue is whether the phrase "or through the alteration, deletion, or insertion of programs or data" used in La. R.S. 14:73.5(A)(2) is vague. Although the first part of La. R.S. 14:73.5(A)(2) refers to "false or fraudulent" types of

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[7] Of the forty-two states that have computer crime statutes, nineteen require some form of "knowing access" for all forms of computer crime. The rest (like Louisiana) only require "knowing" or "intentional" access when the access itself is the crime. This is a matter of legislative discretion; the failure to do so does not make the statute unconstitutionally vague.

[8] For example, under La. R.S. 14:62.2 (simple burglary of an inhabited dwelling), knowledge that the dwelling was inhabited is not required since the statute provides for a mens rea. See also La. R.S. 14:62.1 (simple burglary of a pharmacy); La. R.S. 14:62.3 (unauthorized entry of an inhabited dwelling); La. R.S. 14:62.4 (unauthorized entry into a place of business).

conduct, no such requirement is given in the second phrase. The court of appeal found:

> Dr. Dichmann, qualified as an expert in English grammar and linguistics, testified that the two prepositional phrases in that section are of equal value and can be read in the alternative, so the section could be understood to mean:
>
> 1) obtain money, property or services by means of false or fraudulent conduct, practices, or representations; or
>
> 2)obtain money, property or services through the alteration, deletion or insertion of programs or data.
>
> Because of the "or" after "representations," it is impossible to read the last prepositional phrase as being modified by the words "false or fraudulent." When the subsection is read according to the fair import of its words, the meaning is not clear as to what conduct is proscribed, since there is no mens rea required to violate that portion of the statute.

We agree with the court of appeal and conclude that an ordinary person of reasonable intelligence would not be capable of discerning what type of conduct was prohibited under the last phrase of La. R.S. 14:73.5.[9] Accordingly, we hold the phrase to be unconstitutionally vague.

The unconstitutionality of one portion of a statute does not necessarily render the entire statute unenforceable. If the

[9] The legislature apparently reached a similar conclusion, since it amended La. R.S. 14:73.5(A)(2) to read "or through the fraudulent alteration, deletion, or insertion of programs or data." (Emphasis added.) 1988 La. Acts No. 184, § 1. Since the conduct here occurred between 1985 and 1986 and the amended statute was not effective until July 1, 1988, it is not applicable in this case.

remaining portion of the statute is severable from the offending portion, this court may strike only the offending portion and leave the remainder intact. State v. Williams, 400 So. 2d 575 (La. 1981). The test for severability is whether the unconstitutional portions of the statute are so interrelated and connected with the constitutional parts that they cannot be separated without destroying the intention manifested by the legislature in passing the act. Cobb v. Louisiana Board of Institutions, 237 La. 315, 111 So. 2d 126 (1958). In the present case, it is clear that the last phrase adds little, if anything, to the statute. Removal of the phrase will not affect the legislative intent behind passing the computer fraud statute. We therefore find the remainder of the statute can stand.

In sum, we conclude that the terms access and computer as defined in La. R.S. 14:73.1(1) & (2) and used in La. R.S. 14:73.5 are not unconstitutionally vague. We find that the phrase "or through the alteration, deletion, or insertion of programs or data" is unconstitutionally vague and must be striken. However, since the phrase can be severed, the rest of the statute remains constitutional. Accordingly, the court of appeal erred in finding the entire statute unconstitutionally vague and in granting the motion to quash.

DECREE

For the foregoing reasons, the judgment of the court of appeal is reversed, the ruling of the trial judge denying the motion to quash is reinstated and the case is remanded to the district court for further proceedings in accordance with law.

Watson J. concurs in the holding that the statute is not unconstitutionally vague but notes serious doubts about the application of the law to the facts outlined by counsel in argument.

APPENDIX B

SUPREME COURT OF LOUISIANA

NO. 88-WA-2459

STATE OF LOUISIANA

V.

PAUL J. AZAR, JR., M.D.

ON APPLICATION FOR REHEARING

Rehearing denied.

PER CURIAM

Defendant is not precluded from raising a new motion to quash in the district court if any of the counts of the indictment are based solely on the stricken phrase "or through the alteration, deletion, or insertion of programs or data" La. R.S. 14:73.5(A)(2).

APPENDIX C

NO. K88-273

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

STATE OF LOUISIANA,

Respondent

vs.

PAUL J. AZAR,

Relator

ON WRIT OF CERTIORARI FROM THE FIFTEENTH JUDICIAL DISTRICT COURT, IN AND FOR THE PARISH OF LAFAYETTE, STATE OF LOUISIANA, BEFORE HONORABLE ROGER C. SELLERS, DISTRICT JUDGE, PRESIDING.

Before: FORET, YELVERTON & KNOLL, JJ.

FORET, J.

On July 27, 1987, relator, Paul J. Azar, M.D., was charged by bill of indictment with thirty-seven counts of computer fraud, a violation of La. R.S. 14:73.5. A motion to quash the indictment was denied on January 22, 1988, after a hearing on the constitutionality of the statute. The trial court granted a stay order pending the filing of the application for writs. We granted a writ of certiorari in order to fully consider relator's claim of unconstitutionality of the statute.

In 1985, Congress passed the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), which added

certain new subsections to the Medicare provisions. The new statute prevents cataract surgery patients who are enrolled in the Medicare program from engaging the services of an assistant eye surgeon to work with the primary surgeon. The statute has the effect of severely restricting the payment of assistant surgeon fees by Medicare.

Relator, a Lafayette eye surgeon, has been charged with computer fraud with respect to his computerized billing of assistant eye surgeon fees. The statute he was charged under, La. R.S. 14:73.5, is fairly new and, as of this writing, no cases have been reported under it.

La. R.S. 14:73.5, in pertinent part, reads as follows:

"A. Computer fraud is the accessing or causing to be accessed of any computer, computer system, computer network, or any part thereof with intent to:

(1) Defraud; or

(2) Obtain money, property, or services by means of false or fraudulent conduct, practices, or representations, or through the alteration, deletion, or insertion of programs or data.

* * * * * * "

(Emphasis added)

Relator contends that the trial court erred in denying the motion to quash. He asserts that La. R.S. 14:73.5 is unconstitutionally vague and overbroad. First, relator argues that La. R.S. 14:73.5, read in conjunction with the definitions section of the statute, creates a legislative dictate so vague and incomprehensible that it cannot provide a clear basis for criminal prosecution. In particular, relator takes issue with the

definitions for "computer" and "access," and the last phrase of subsection (2). Secondly, relator maintains that the last phrase in subsection (2) of the statute which reads . . . "or through the alteration, deletion or insertion of programs or data" is overbroad in that its language purports to criminalize innocent conduct, since the language can easily be read as a separate and independent phrase apart from the first phrase of subsection (2).

The definitions for "access" and "computer" are set forth in La. R.S. 14:73.1:

"As used in this Subpart unless the context clearly indicates otherwise:

(1)'Access' means to program,to execute programs on, to communicate with, store data in, retrieve data from, or otherwise make use of any resources,including data or Programs, of a computer, computer system, or computer network.

(2) 'Computer' includes an electronic, magnetic, optical, or other high-speed data processing device or system performing logical, arithmetic, and storage functions, and includes any property, data storage facility, or communications facility directly related to or operating in conjunction with such device or system. 'Computer' shall not include an automated typewriter or typesetter, a machine designed solely for word processing, or a portable hand-held calculator, nor shall 'computer' include any other device which might contain components similar to those in computers but in which the components have the sole function of controlling the device for the single purpose for which the device is intended."

Relator was charged with thirty-seven counts of computer fraud. Each count of the indictment is worded exactly the same way, except to allege that the offenses were committed on

different days. All of the thirty-seven counts charge that relator "committed the offense of Computer Fraud as defined by Louisiana Revised Statute Title 14, Article 73.5, in that he did access or cause to be accessed, a computer, computer system or computer network, or any part thereof, with the intent to defraud or obtain money by means of false or fraudulent conduct, practices or representations or through the insertion of programs or data."

> "The United States Supreme Court has held that a party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights; and, as a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situation. *County of Ulster v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d. 777 (1979); *State v. Turner*, 392 So.2d 436, 441 (La. 1980)."

State v. Furlow, 460 So2d 76, 78 (La. App. 1 Cir. 1984). Since the indictment has charged computer fraud by using similar language as in the challenged provision, relator has standing to raise the issue of the constitutionality of 14:73.5.

IS THE STATUTE VAGUE OR OVERBROAD?

Relator's first contention is that the statute is vague based on the definitions set forth in La. R.S. 14:73.1, of "computer" and "access." Relator called several witnesses at the hearing on the motion to quash in order to establish the vagueness of 14:73.5. Dr. James Oliver was qualified as an expert regarding computers and computer programming. He testified that two key words in the statute, "computer" and "access," have definitions which leave them subject to ambiguous meanings. Louisiana State Representative Alan Bradley, author of the legislation, testified as to the legislative intent of the statute. He

testified that the statute was intended to cover three main areas:

> (1) traditional taking - where someone would electronically transfer money from one bank account to another;
>
> (2) accessing information for the purposes of retrieving that information, copying it and then reselling it without damaging the information in the computer;
>
> (3) "computer vandalism," novice operators who manage to infiltrate a system where they have no authority to be and destroy information.

Relator has asserted that the statute is both vague and overbroad. In order for the principle of overbreadth to apply, a constitutionally protected right must be claimed in the prosecution. State v. Griffin, 495 So2d 1306 (La. 1986). Moreover, overbreadth invalidations of statutes are generally inappropriate when the allegedly impermissible applications of the challenged statute affect conduct rather than speech. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); State v. Neal, 500 So2d 374 (La. 1987). The aim of the legislature in drafting and implementing La. R.S. 14:73.5 was to criminalize computer or electronic vandalism and theft of intellectual property or funds by the use of computers. Relator does not contend nor is there any support for the proposition that one has a constitutional right under either the Louisiana or United States Constitution to engage in the conduct sought to be prohibited. Since the statute does not reach a substantial amount of constitutionally protected conduct, the overbreadth challenge must fall. Village of Hoffman Est. v. Flipside, Hoffman Est., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

Relator's contention that La. R.S. 14:73.5 is vague rests on two propositions: 1) that the definitions for "computer" and "access" are vague and, 2) that the last prepositional phrase in subsection (2) of the statute is impermissibly vague. A statute is presumed to be constitutional. State v. Brenner, 486 So2d 101 (La. 1986). A party challenging the statute has the burden of proving its unconstitutionality. State v. Griffin, supra.

> "The guarantee of procedural due process embodied in the United States Constitution and Art. I, § 2, of the Louisiana Constitution requires that a criminal enactment contain an ascertainable standard of guilt that is 'not so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.' Giaccio v. Pennsylvania, 382 U.S. 399 at 403, 86 S.Ct. 518 at 520-521, 15 L.Ed.2d 447 at 450 (1966)."
>
> State v. Liuzza, 457 So2d 664, 665 (La. 1984) .

Under the "void-for-vagueness" doctrine, a criminal statute must meet two requirements to satisfy due process: (1) adequate notice to individuals that certain contemplated conduct is proscribed; and (2) adequate standards for those charged with determining the guilt or innocence of the accused. State v. David, 468 So2d 1126 (La. 1984), U.S. cert. denied, 476 U.S. 1130, 106 S.Ct. 1998, 90 L.Ed.2d 678 (1986); State v. Lambert, 514 So2d 550 (La. App. 3 Cir. 1987).

Relator's expert witness in computers and computer systems gave various examples of conduct which he felt would be covered by the statute but would be legitimate conduct, such as calling the time and temperature number, or using a bank automatic teller machine. All of these activities would involve

accessing a computer according to the definitions of the statute. Additionally, relator's expert witness testified that in many cases a person would not be aware of the fact that they have accessed a computer. "[A] penal statute must describe unlawful conduct with sufficient particularity and clarity that ordinary men of reasonable intelligence are capable of discerning its meaning and conforming their conduct thereto." State v. Lambert, supra, at 552, citing State v. Union Tank Car Co., 439 So2d 377, 385 (La. 1983). The statute clearly prohibits the accessing of computers for fraudulent purposes. Nevertheless, the statute requires no knowledge on the part of a user that "access" has occurred. This definition of "access" is unconstitutionally vague insofar as it does not provide adequate notice as to the conduct proscribed. "Adequate notice consists of language which allows ordinary men of reasonable intelligence to understand and obey the law." City of Bossier City v. Gray, 483 So2d 1090, 1092 (La. App. 2 Cir. 1986).

In this day and time when computer technology is such a part of our everyday lives, an ordinary man of reasonable intelligence may access or cause a computer to be accessed without the slightest awareness that this access has taken place. The statute is clearly intended to proscribe that conduct wherein the use of a computer is central and an essential element of the crime, i.e., the crime could not have been committed "but for" the use of a computer. Applying the definition of "access" as it now exists, unlawful conduct may involve only incidental access or use of a computer and remain within the broad parameters of the conduct proscribed by La. R.S. 14:73.5. "A vague statute describes conduct in a manner so unclear that it leaves intelligent people uncertain as to the limits of its application." City of Bossier City, supra, at page 1092. We find the definition of "access" set forth in La. R.S. 14:73.1(1), unconstitutionally vague insofar as an accused could be subject to prosecution without any awareness that an "access" to a computer had taken place.

Relator also argues that subsection (2) of La. R.S. 14:73.5 is unconstitutionally vague. The relevant portion reads:

> "Computer fraud is the accessing or causing to be accessed of any computer, computer system, computer network, or any part thereof with the intent to:
>
> * * * * *
>
> (2) Obtain money, property, or services by means of false or fraudulent conduct, practices, or representations, or through the alteration, deletion or insertion of programs or data." (Emphasis added.)

Dr. Dichmann, qualified as an expert in English grammar and linguistics, testified that the two prepositional phrases in that section are of equal value and can be read in the alternative, so the section could be understood to mean:

> 1) obtain money, property or services by means of false or fraudulent conduct,practices, or representations;
> or
>
> 2) obtain money, property or services through the alteration, deletion or insertion of programs or data.

Because of the "or" after "representations," it is impossible to read the last prepositional phrase as being modified by the words "false or fraudulent." When the subsection is read according to the fair import of its words, the meaning is not clear as to what conduct is proscribed, since there is no mens rea required to violate that portion of the statute.

The constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea. United States v. United States Gypsum Co., 438 U.S.

422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). The lack of scienter in a statute is little more than a trap for those who act in good faith. Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." Papachristou v. City of Jacksonville, supra, at 845.

The existence of mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed.1137 (1951); State v. Brown, 389 So2d 48 (La. 1980).

> "In a much cited passage from Morissette v. United States, 342 U.S. 246, 250-251, 72 S.Ct. 240, 243, 244, 96 L.Ed. 288 (1952), the United States Supreme Court observed:
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> 'The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't meant to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will'.'"

State v. Brown, supra, at 50.

The subsection on its face is vague in the conduct it seeks to proscribe. Reading the plain language of the statute, innocent conduct such as use of an automatic teller machine to obtain money could subject one to prosecution under the statute. Persons of ordinary intelligence are not given fair notice of what conduct is forbidden. Accordingly, the language "or through the alteration, deletion, or insertion of programs or data," found in La. R.S. 14:73.5 subsection (2) is declared unconstitutional.

> "The unconstitutionality of one portion of the statute, however, does not necessarily render the entire statute unenforceable. If the remaining portion of the statute is severable from the offending portion, this Court often strikes only the offending portion and leaves the remainder intact."
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> State v. Williams, 400 So2d 575, 580 (La. 1981).

We find, however, in the case before us, that the unconstitutionally vague definition of "access" is applicable throughout La. R.S. 14:73.5 and, as such, the entire statute cannot withstand constitutional scrutiny and must fall.

For the foregoing reasons, the writ is made peremptory, the ruling of the trial court is reversed, and relator's motion to quash the indictment is granted. All costs of court and cost of the writ application are assessed to respondent, the State of Louisiana.

REVERSED AND RENDERED.

APPENDIX D

SUBPART D. COMPUTER RELATED CRIME

§ 73.1. Definitions

As used in this Subpart unless the context clearly indicates otherwise:

(1) "Access" means to program, to execute proqrams on, to communicate with, store data in, retrieve data from, or otherwise make use of any resources, including data or programs, of a computer, computer system, or computer network.

(2) "Computer" includes an electronic, magnetic, optical, or other high-speed data processing device or system performing logical, arithmetic, and storage functions, and includes any property, data storage facility, or communications facility directly related to or operating in conjunction with such device or system. "Computer" shall not include an automated typewriter or typesetter, a machine designed solely for word processing, or a portable hand-held calculator, nor shall "computer" include any other device which might contain components similar to those in computers but in which the components have the sole function of controlling the device for the single purpose for which the device is intended.

(3) "Computer network" means a set of related, remotely connected devices and communication facilities including at least one computer system with capability to transmit data through communication facilities.

(4) "Computer program" means an ordered set of data representing coded instructions or statements that when executed by a computer cause the computer to process data.

(5) "Computer services" means providing access to or service or data from a computer, a computer system, or a computer network.

(6) "Computer software" means a set of computer programs, procedures, and associated documentation concerned with operation of a computer system.

(7) "Computer system" means a set of functionally related, connected or unconnected, computer equipment, devices, or computer software.

(8) "Financial instrument" means any check, draft, money order, certificate of deposit, letter of credit, bill of exchange, access card as defined in R.S. 14:67.3, or marketable security.

(9) "Intellectual property" includes data, computer programs, computer software, trade secrets as defined in R.S. 51:1431(4), copyrighted materials, and confidential or proprietary information, in any form or medium, when such is stored in, produced by, or intended for use or storage with or in a computer, a computer system, or a computer network.

(10) "Proper means" include:

(a) Discovery by independent invention;

(b) Discovery by "reverse engineering", that is by starting with the known product and working backward to find the method by which it was developed. The acquisition of the known product must be by lawful means;

(c) Discovery under license or authority of the owner;

(d) Observation of the property in public use or on public display; or

(e) Discovery in published literature.

(11) "Property" means property as defined in R.S. 14:2(8) and shall specifically include but not be limited to financial instruments, electronically stored or produced data, and computer programs, whether in machine readable or human readable form.

Added by Acts 1984, No. 711, § 1.

§ 73.2. Offenses against intellectual property

A. An offense against intellectual property is the intentional:

(1) Destruction, insertion, or modification, without consent, of intellectual property; or

(2) Disclosure, use, copying, taking, or accessing, without consent, of intellectual property.

B. (1) Whoever commits an offense against intellectual property shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both, for commission of the offense.

(2) However, when the damage or loss amounts to a value of five hundred dollars or more, the offender may be fined not more than ten thousand dollars, or imprisoned with or without hard labor, for not more than five years, or both.

C. The provisions of this Section shall not apply to disclosure, use, copying, taking, or accessing by proper means as defined in this Subpart.

Added by Acts 1984, No. 711, § 1.

§ 73.3. Offenses against computer equipment or supplies

A. An offense against computer equipment or supplies is the intentional modification or destruction, without consent, of computer equipment or supplies used or intended to be used in a computer, computer system, or computer network.

B. (1) Whoever commits an offense against computer equipment or supplies shall be fined not more than five hundred dollars, or be imprisoned for not more than six months, or both.

(2) However, when the damage or loss amounts to a value of five hundred dollars or more, the offender may be fined not more

than ten thousand dollars, or imprisoned with or without hard labor, for not more than five years, or both.

Added by Acts 1984, No. 711, § 1.

§ 73.4. Offenses against computer users

A. An offense against computer users is the intentional denial to an authorized user, without consent, of the full and effective use of or access to a computer, a computer system, a computer network, or computer services.

B. (1) Whoever commits an offense against computer users shall be fined not more than five hundred dollars, or be imprisoned for not more than six months, or both, for commission of the offense.

(2) However, when the damage or loss amounts to a value of five hundred dollars or more, the offender may be fined not more than ten thousand dollars, or imprisoned with or without hard labor, for not more than five years, or both.

Added by Acts 1984, No. 711, § 1.

§ 73.5. Computer fraud

A. Computer fraud is the accessing or causing to be accessed of any computer, computer system, computer network, or any part thereof with the intent to:

(1) Defraud; or

(2) Obtain money, property, or services by means of false or fraudulent conduct, practices, or representations, or through the alteration, deletion, or insertion of programs or data.

B. Whoever commits computer fraud shall be fined not more than ten thousand dollars, or imprisoned with or without hard labor for not more than five years, or both.

Added by Acts 1984, No. 711, § 1.